

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRANS-SPEC TRUCK SERVICE, INC.
d/b/a TRUCK SERVICE,

Plaintiff

vs.

CATERPILLAR INC.

Defendant

CIVIL ACTION NO. 04-11836-RCL

CATERPILLAR INC.'S REQUEST FOR RECONSIDERATION BY DISTRICT COURT
JUDGE OF MAGISTRATE-JUDGE'S RULING ON PLAINTIFF'S EMERGENCY [SIC]
MOTION TO EXTEND THE DISCOVERY DEADLINE AND TO REQUIRE PRODUCTION
OF DOCUMENTS

The defendant Caterpillar Inc. hereby requests reconsideration pursuant to 28 U.S.C. §636(b)(1)(A) and Fed. R. Civ. P. 72(a) of the June 1, 2006, order of Magistrate-Judge Alexander granting the motion entitled Emergency Motion of the Plaintiff to Compel Production of Documents and to Extend Expert Discovery Period (the "June 1 order"). A copy of the June 1 order is attached hereto. It reads in its entirety:

It is hereby ordered that the depositions noticed by Trans-Spec be taken on or before June 30, 2006, notwithstanding the objection of Caterpillar's counsel, who it must be noted, requested sanctions for preparing for the depositions. The documents requested by Trans-Spec, must be produced by June 14, 2006.

Neither the June 1 order nor the Magistrate-Judge's remarks at the hearing (as to which *see* the transcript of the hearing attached as Exhibit A to the accompanying memorandum) identify the basis for her order.

If the Magistrate-Judge granted the motion without first finding that Trans-Spec could not, by exercising reasonable diligence, have met the scheduling order deadline, then she

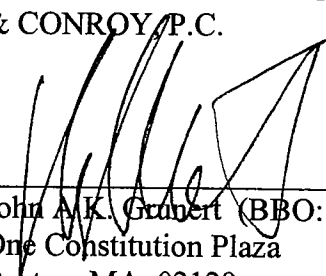
committed error of law. If the Magistrate-Judge did make such a finding, the finding is clearly erroneous because there was no evidentiary basis or other basis in the record to support such a finding. Caterpillar refers the Court to the accompanying memorandum and exhibits in further support of this request.

WHEREFORE, Caterpillar asks the Court to reverse the Magistrate-Judge's June 1 order and enter its own order denying Trans-Spec's motion in its entirety.

CATERPILLAR INC.,

By its attorneys,

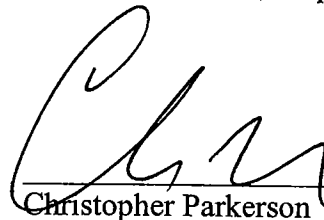
CAMPBELL CAMPBELL EDWARDS
& CONROY P.C.



John A.K. Grubert (BBO: 213820)
One Constitution Plaza
Boston, MA 02129
(617) 241-3000

CERTIFICATE OF SERVICE

I, Christopher Parkerson, hereby certify that on June⁹, 2006, I served the within request by causing a copy to be transmitted electronically to Christian Samito, Esquire, Donovan Hatem LLP, 2 Seaport Lane, Boston, MA 02210.



Christopher Parkerson

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRANS-SPEC TRUCK SERVICE, INC.)	
d/b/a TRUCK SERVICE,)	
)	
Plaintiff)	
)	
vs.)	CIVIL ACTION NO. 04-11836-RCL
)	
CATERPILLAR INC.)	
)	
Defendant)	

MEMORANDUM IN SUPPORT OF CATERPILLAR INC.'S REQUEST FOR
RECONSIDERATION BY DISTRICT COURT JUDGE OF MAGISTRATE-JUDGE'S
RULING ON PLAINTIFF'S EMERGENCY [SIC] MOTION TO EXTEND THE DISCOVERY
DEADLINE AND TO REQUIRE PRODUCTION OF DOCUMENTS

After hearing, the Magistrate-Judge ordered (hereinafter the "June 1 order"):

It is hereby ordered that the depositions noticed by Trans-Spec be taken on or before June 30, 2006, notwithstanding the objection of Caterpillar's counsel, who it must be noted, requested sanctions for preparing for the depositions. The documents requested by Trans-Spec, must be produced by June 14, 2006.

No findings or memorandum of decision were issued¹. The transcript of the entire May 31, 2006, hearing (several motions in addition to the one now before the Court having been argued at that hearing) is attached as Exhibit A to this memorandum.

¹ The significance of the Magistrate-Judge's allusion in her order to the motion for sanctions filed by Caterpillar after Trans-Spec's counsel failed to appear for the referenced depositions on the dates for which they had been noticed is unclear. It seems to indicate failure to distinguish the legal and factual issues determinative of a motion to amend the scheduling order (the motion to which this Objection pertains) from the legal and factual issues determinative of a motion for sanctions Fed. R. Civ. P. 30(g)(1) for failure of the party who noticed a deposition to appear at it (an issue on which no actual order has yet been issued, notwithstanding the Magistrate-Judge's statement that she plans to deny Caterpillar's motion for sanctions). If it is relevant, which Caterpillar does not believe it is, review of Caterpillar's Motion for Sanctions and the supporting memorandum and evidential materials will disclose to the Court that the June 1 order does not accurately describe the sanctions Caterpillar sought or the basis on which it sought them and that there is no evidence that all of the witnesses who should have been deposed on the dates for which Trans-Spec noticed their depositions have been prepared to testify. Caterpillar's counsel did not prepare three of the five witnesses and ceased the incipient preparation of a fourth once Trans-Spec told him unequivocally it would not go forward with the depositions.

The standard of review of a Magistrate-Judge's order on a non-dispositive motion is well settled.

Factual findings are reviewed for clear error. 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P. 72(a). "A magistrate judge's factual finding is considered clearly erroneous when it is contrary to the clear weight of the evidence, or when the court has a definite and firm conviction that a mistake has been committed." Young v. Conductron Corp., 899 F. Supp. 39, 40 (D. N.H. 1995) (internal quotation marks omitted). When the magistrate judge has made no specific findings and has not explained her reasoning, however, her order is "divested of its usual force, and the district judge [is] entitled to discount it to some degree." Quaker State Oil Refining Corp. v. Garrity Oil Co., Inc., 844 F.2d 1510, 1517 n.5 (1st Cir. 1989). *Accord*, e.g., Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D. D.C. 1995) (where the magistrate judge offers no reasoned explanation for the decision, the district judge must check the findings against the record with "painstaking care.") If there is *no* record evidence to support the finding, of course, it constitutes not just clear error but error of law, and must be set aside by the District Court Judge for that reason.

A Magistrate-Judge's rulings of law are subject to de novo review. Any order based upon an error of law, or on failure to apply the governing law, must be set aside. *E.g.*, Gandee v. Glaser, 785 F. Supp. 684, 686 (S.D. Ohio 1992); Pascale v. G.D. Searle & Co., 90 F.R.D. 55, 59 (D. R.I. 1981).

PERTINENT PROCEDURAL BACKGROUND

There is no dispute about any of the following facts.

This action was commenced on August 23, 2004. A scheduling conference was convened pursuant to Fed. R. Civ. P. 16(b) on October 27, 2004 and the Court thereafter issued

its scheduling order. The order, as relevant here, established a July 27, 2005, deadline for Trans-Spec's submission of expert reports, an August 24, 2005, deadline for Caterpillar's submission of expert reports, and an October 26, 2005, deadline for completing depositions of experts.

On May 20, 2005, the parties jointly moved to amend the scheduling order. The motion, as relevant here, asked the Court to enlarge the deadline for Trans-Spec's expert reports to September 27, 2005, for Caterpillar's expert reports to October 24, 2005, and for completion of depositions of experts to December 23, 2005. The Court granted the motion on June 1, 2005.

On August 12, 2005, Trans-Spec moved (with Caterpillar's assent) to amend the scheduling order a second time. The motion, as relevant here, asked the Court to enlarge the deadline for Trans-Spec's expert reports to October 27, 2005, for Caterpillar's expert reports to November 23, 2005, and for completion of depositions of experts to January 23, 2006. The Court granted the motion on August 16, 2005.

On October 7, 2005, Trans-Spec again moved (with Caterpillar's assent) to amend the scheduling order. The motion, as relevant here, asked the Court to enlarge the deadline for Trans-Spec's expert reports to December 27, 2005, for Caterpillar's expert reports to January 23, 2006, and for completion of depositions of experts to March 23, 2006. This time, the Court did not grant the motion in its entirety. On October 26, 2005, the Court issued its order stating:

The motion is granted to the extent that it seeks a change to the scheduling order. However, the scheduling order will be changed only to this extent: the deadline for expert reports from the plaintiff shall be December 7, 2005; the deadline for expert reports from the defendant shall be January 13, 2006; expert discovery shall be concluded by February 17, 2006; dispositive motions shall be filed not later than March 17, 2006. The modification granted today is the third of such modifications in this case. The court will grant no further requests for amendments to the scheduling order.

Caterpillar supplied expert reports to Trans-Spec on January 13, 2006, as required by the thrice-amended scheduling order. See Emergency Motion of the Plaintiff to Compel Production

of Documents and to Extend Expert Discovery Period (hereinafter “Plaintiff’s Motion”) at 2. On January 30, 2006, Trans-Spec first served notices of taking depositions of Caterpillar’s experts. Trans-Spec noticed depositions in Peoria, Illinois, for February 13, 14, 15 and 16, all agreed dates². Affidavit of John Grunert, ¶2. (This affidavit, a copy of which is attached to this memorandum as Exhibit B, was exhibit 2 to Caterpillar’s motion for sanctions that was heard at the same time as Plaintiff’s Motion and, as suggested by the language of the June 1 order itself, treated by the Magistrate-Judge together with Plaintiff’s Motion.) Trans-Spec noticed the deposition of a fifth expert for February 24, 2006, in Denver, Colorado. Caterpillar did not object to the minimally-late date specified for the fifth deposition in light of Trans-Spec’s counsel’s stated unavailability to depose the fifth expert when he was available prior to the deadline. The witnesses were at all times available for their depositions on the scheduled dates, as were defense counsel. Affidavit of John Grunert, ¶¶13 and 14, and the e-mail attached as Exhibit C hereto.

The deposition notices had appended to them schedules of documents which the witnesses were asked to produce. The schedules varied in length from 61 to 76 separate requests. *See* Exhibits A through E to Plaintiff’s Motion. Each notice stated that the requested documents were to be produced by the witness in Boston, Massachusetts, on February 9, 2006, rather than at the time and place of the deposition. *Id.* Trans-Spec’s counsel had not previously raised with

² The Magistrate-Judge at one point during the hearing stated, “It seems as though a deposition was, and I don’t even know if I’m using the correct words, but tentatively scheduled and there was some – well the tentativeness seems to be because of the discussion between Caterpillar and Trans-Spec.” Hearing Transcript at 8 (lines 10-14). Nothing in the record indicates the deposition scheduling was “tentative” and Trans-Spec made no such assertion in its motion. *See* Plaintiff’s Motion at 3 (“Trans-Spec did not subpoena the individuals designated as experts by Caterpillar but, instead, arranged for mutually convenient dates and times with the attorney for Caterpillar.”) The only evidence is that the dates were chosen by agreement of the parties, they were embodied in formal notices of taking deposition, and the witnesses and defense counsel were at all times ready to proceed on the dates scheduled. *See* Exhibits B to E to Plaintiff’s Motion (the notices); Affidavit of John Grunert, ¶¶2 and 14 ; e-mail of February 13, 2006 (this e-mail, Exhibit C to this Objection, was Exhibit 6 to the motion for sanctions heard at the same time as Plaintiff’s Motion). Any belief the Magistrate-Judge may have held to the contrary was plainly wrong.

defense counsel the idea of Caterpillar's experts producing documents in advance of their depositions or anywhere other than at the place of the deposition, and defense counsel had not agreed that such production would be made. Affidavit of John Grunert, ¶5. On February 8, 2006, each witness served a timely response pursuant to Fed. R. Civ. P. 45(c)(2)(B) in which, *inter alia*, he objected to the time and place specified for production of the requested documents and stated that (subject to a few objections) they would be produced at the deposition. See Exhibit G to Plaintiff's Motion.

Late in the day on February 8, before they received the Rule 45(c)(2)(B) objections, Trans-Spec's counsel called defense counsel and raised the subject of the desired document production. Defense counsel reported that timely objections had been served to the specified date and place for production but that each expert would produce the requested documents at his deposition in accordance with law and customary practice. Trans-Spec's counsel said they wanted the documents in advance, would file an "emergency" motion to require production of the documents in advance and in Boston, and would not go forward with the depositions as scheduled unless their emergency motion was denied or the documents were produced in advance in Boston. Affidavit of John Grunert, ¶6; Affidavit of Nancy M. Reimer, ¶6 ("I also informed Attorney Grunert during this February 8, 2006 telephone conference that Trans-Spec would not go forward with the depositions unless it received the documents beforehand or the Court denied an Emergency Motion I would draft and file regarding this issue.") (this affidavit, of which a copy is Exhibit D to this memorandum, was attached to Trans-Spec's opposition to Caterpillar's motion for sanctions)

No motion was filed that day or the following morning. Defense counsel, therefore believing the depositions would go forward as scheduled, left for Peoria to begin preparing the

first witness for his deposition, as he had told Trans-Spec's counsel he would do.³ Affidavit of John Grunert, ¶7. At 3:18 PM on February 9 the motion to which the present Objection pertains was filed. Though entitled an "emergency" motion, it was not captioned in accordance with LR 5.1(c) (pertaining to requests for action outside the ordinary course). The record contains no evidence of what, if any, effort Trans-Spec made to cause the Court to address the motion on an emergency basis and Caterpillar has no information on that subject. Caterpillar served and filed Caterpillar Inc.'s Response to Emergency Motion of the Plaintiff to Compel Production of Documents and to Extend Expert Discovery Period (hereinafter "Caterpillar's Opposition") at 10:18 AM on February 10, including in it a request for immediate hearing and indicating its counsel's availability for hearing any time that day by telephone. Caterpillar's Opposition specifically told Trans-Spec's counsel, if they did not already know, that Caterpillar's counsel was in Peoria anticipating that the depositions would go forward as scheduled. Caterpillar's Opposition at 6-7. There was no action on the motion.

On February 13, 2006, that day's scheduled witness (Mr. Richard Bowes) appeared at the time and place specified for his deposition, but Trans-Spec's counsel did not appear. Affidavit of John Grunert, ¶14. Caterpillar's counsel communicated with Trans-Spec's counsel confirming the availability of the February 14, 15, and 16 witnesses as well, but Trans-Spec's counsel stated the depositions would not be taken as scheduled. Exhibit C hereto.

Hearing on Trans-Spec's motion was held before the Magistrate-Judge on May 31, 2006. No evidence was presented to indicate the depositions could not readily have been taken as scheduled. The only "evidence" was that Trans-Spec's counsel, for tactical reasons, *did not wish* to take them as scheduled: she felt she would take them more effectively if she had an

³ February 8 was a Wednesday. Defense counsel had to fly to Peoria on Thursday, February 9, in order to be available on Friday morning, February 10, to prepare the witness scheduled to be deposed beginning at 10:00 AM the following Monday, February 13. Affidavit of John Grunert, ¶4.

opportunity to spend a few days reviewing the experts' documents before deposing them. But no explanation was offered for why Trans-Spec's counsel had not timely raised those alleged concerns with defense counsel – why, for example, the subject was not raised when counsel for the parties were discussing dates for the depositions – so that they could have been addressed consistent with the scheduling order. Affidavit of John Grunert, ¶¶2 and 5. Nor was an explanation offered for why Trans-Spec's counsel never raised the issue with the Court, for example in the multiple requests for amendments to the scheduling order they filed. The Magistrate-Judge, however, did not inquire on those subjects. *See* Hearing Transcript, especially pages 7 to 14 and 29 to 37.

ARGUMENT

Fed. R. Civ. P. 16(b) directs that a scheduling order “shall not be modified except upon a showing of good cause.” The Advisory Committee’s Note to Rule 16(b) says, in pertinent part, that the order may be modified “on a showing of good cause, if it cannot reasonably be met despite the diligence of the party seeking the extension.” Advisory Committee Note to the 1983 Amendment to Subdivision (b). The Court of Appeals for the First Circuit recently instructed, “Rule 16(b)’s ‘good cause’ standard emphasizes the diligence of the party seeking the amendment.” O’Connell v. Hyatt Hotels of Puerto Rico, 357 F.3d 152, 155 (1st Cir. 2004). The Court of Appeals for the Ninth Circuit has explained:

The district court may modify the pretrial schedule “if it cannot reasonably be met despite the diligence of the party seeking the extension.” Fed.R.Civ.P. 16 advisory committee’s notes (1983 amendment). Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Although the existence and degree of prejudice to the party opposing the modification might supply additional reasons for denying a motion, the focus of the inquiry is upon the moving party’s reasons for seeking modification. If that party was not diligent, the inquiry should end.

Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) (most citations omitted). LR 16.1(G) provides that the “showing” of good cause is to be supported by affidavits, other evidentiary materials, or references to pertinent portions of the record. Rule 16(b) and the cases discussing it supply the legal standard the Court must apply in deciding Trans-Spec’s motion. Failure to apply the correct legal standard is reversible error of law.

Trans-Spec presented the Court with no affidavits or other evidentiary material on which the Magistrate-Judge could have found that Trans-Spec exercised diligence in attempting to take the depositions of Caterpillar’s experts within the time allowed by the thrice-amended scheduling order; nor did Trans-Spec direct the Magistrate-Judge to matter already in the record upon which such a finding could have been based. In fact there is no such evidence. The evidence is that Trans-Spec *chose*, for tactical reasons, not to take these depositions within the time allowed; Trans-Spec found the constraints imposed by the October 26 order inconvenient so it disregarded them, notwithstanding the unequivocal warning with which the Court concluded that order.

There were seven exhibits attached to Plaintiff’s Motion, the first five of which consist solely of copies of the deposition notices themselves, the sixth of which consists of Trans-Spec’s counsel’s February 9 letter explaining her alleged tactical reasons for wanting to see the experts’ documents in advance, and the last of which consists of copies of the experts’ Rule 45(c)(2)(B) objections⁴. In the motion itself Trans-Spec directed the Court’s attention to the October 26 order but otherwise to nothing in the record bearing on the issue of Trans-Spec’s diligence. No further evidence and no further references to the record were made at the hearing. *See* Hearing Transcript⁵. In particular, Trans-Spec offered no explanation (and the Court requested none) for

⁴ Trans-Spec’s counsel repeatedly referred to the aborted depositions as Rule 30(b)(6) depositions. The Court can see from the notices themselves that as a matter of law they were not Rule 30(b)(6) depositions.

⁵ There was a variety of evidential material before the Court in connection with other motions heard at the same time as this one. None of that material, except for items attached as exhibits to this memorandum, bore upon Trans-

why its counsel waited until January 30, 2006, to notify Caterpillar's counsel *for the first time ever* that they would want defense experts' documents produced in Boston a mere ten days later⁶; and it offered no explanation (and the Court requested none) for why it waited more than two weeks after receiving Caterpillar's experts' reports in mid-January before issuing notices of taking their depositions on dates just about as late within the discovery period as possible.

The Magistrate-Judge's order granting Trans-Spec's motion does not refer to the governing legal standard established by Rule 16(b) and O'Connell and does not contain any reference, explicit or implicit, to Trans-Spec's diligence or lack thereof. The hearing transcript is likewise devoid of such references.⁷ Compare Quaker State Oil Refining, 884 F.2d at 1517 n. 5 ("The magistrate's order was cryptic. She made no findings and offered no hint as to her reasons for believing the late amendment to be justified. Under such circumstances, the order was divested of its usual force, and the district judge was entitled to discount it to some degree.") It is therefore wholly unclear whether the Magistrate-Judge applied an incorrect legal standard, made a factual finding (to wit, that Trans-Spec could not with reasonable diligence have met the amended deadline) that is unsupported by evidence, or both. What is unmistakably clear,

(cont'd.) Spec's diligence or lack of diligence in trying to take these depositions, and (as the Hearing Transcript demonstrates) Trans-Spec did not direct the Court's attention to any such evidence for that purpose. If the Court wishes to satisfy itself on this score, however, it may review the evidential materials filed in connection with the other motions heard that day, which were Caterpillar Inc.'s Motion for Sanctions, Caterpillar Inc.'s Motion for Summary Judgment on all Remaining Claims, Caterpillar Inc.'s Motion to Strike Certain Exhibits to Trans-Spec's Opposition to Motion for Summary Judgment, and the plaintiff's Motion to Amend the Complaint and to Alter or Amend this Court's Order Dated February 26, 2006.

⁶ The rules of civil procedure contemplate that, ordinarily, a deponent who is asked to produce documents as well as provide testimony will produce the documents at the deposition itself. See Fed. R. Civ. P. 30(b)(5); Fed. R. Civ. P. 45(a)(2) and (c)(2)A).

⁷ The closest thing to such a reference is at pages 8 to 9 of the hearing transcript, where the Magistrate-Judge stated that she did not need to know, and did not deem pertinent, the reasons for Trans-Spec's counsel's wish to have the documents in advance. Caterpillar agrees the reasons were not pertinent – what was pertinent was why Trans-Spec had not raised its wish in reasonably timely fashion with Caterpillar's counsel or with the Court, not whether its position if timely raised would have had any merit. The Magistrate-Judge's immediately ensuing remarks, however, make clear she was not thinking in terms of Trans-Spec's diligence *vel non* when she declined to hear about the reasons why Trans-Spec's counsel supposedly wanted the documents in advance. Those remarks instead suggest the Magistrate-Judge had confused issues related to Caterpillar's motion for sanctions with the issued dispositive of the Plaintiff's Motion to amend the scheduling order again.

however, is that she committed at least one of those two errors and that the June 1 order must therefore be reversed.

Scheduling orders become worse than meaningless if a party is permitted, as Trans-Spec has been, to disregard them unilaterally just to achieve its own tactical objectives. Caterpillar says “worse than meaningless” because when that occurs the scheduling order not only fails to serve its intended purpose – to assure orderly progress of the litigation – but parties who have in good faith relied on the integrity of the order are effectively penalized for that reliance. The expert witnesses whose depositions were scheduled for February 13, 14, 15 and 16 are all regular Caterpillar employees who were specially assigned because of their expertise to provide technical assistance in this case: they are not professional litigation consultants who earn a living testifying. They substantially inconvenienced themselves to assure that they could appear, adequately prepared, to testify on dates they had every reason to believe were firm dates. Caterpillar itself incurred very substantial expense in assuring that its witnesses and counsel would comply with the October 26 order. Notwithstanding the fact that Caterpillar and its experts did all that was necessary to fulfill *their* obligations to comply with the scheduling order and under the rules of civil procedure, the Magistrate-Judge has now entered an order that will impose on them – the ones who *complied* with the scheduling order, not the ones who violated it -- substantial new expense and inconvenience that is indistinguishable from a penalty.

If there were a substantial basis in evidence for concluding that Trans-Spec *reasonably could not have taken* these depositions as scheduled, then it might well be within the Court’s discretion to deem the expense and inconvenience imposed on Caterpillar and its witnesses outweighed by Trans-Spec’s need to conduct the discovery it failed to conduct earlier. But there is no basis in evidence for concluding that. Trans-Spec chose not to take these depositions

within the scheduling order deadline because it suited Trans-Spec's purpose not to take them within the deadline, and Trans-Spec was willing to bet this Court would let it off the hook again despite the unambiguous language with which the Court concluded its October 26, 2006, order. Granting Trans-Spec's motion on that record is error of law and clearly erroneous.

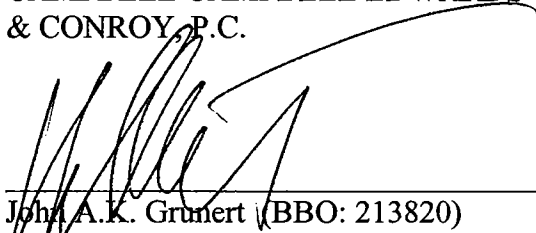
CONCLUSION

The Court should reconsider the Magistrate-Judge's order of June 1, 2006, reverse it, and deny in its entirety the Emergency Motion of the Plaintiff to Compel Production of Documents and to Extend Expert Discovery Period.

CATERPILLAR INC.,

By its attorneys,

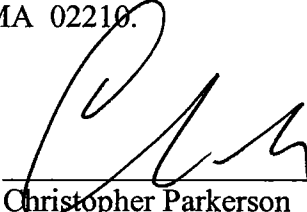
CAMPBELL CAMPBELL EDWARDS
& CONROY, P.C.



John A.K. Grunert (BBO: 213820)
One Constitution Plaza
Boston, MA 02129
(617) 241-3000

CERTIFICATE OF SERVICE

I, Christopher Parkerson, hereby certify that on June^a, 2006, I served the within memorandum by causing a copy to be transmitted electronically to Christian Samito, Esquire, Donovan Hatem LLP, Two Seaport Lane, Boston, MA 02210.



Christopher Parkerson

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

TRANS-SPEC TRUCK SERVICE INC.,)
Plaintiff,)
-V-) CIVIL DOCKET NO.
CATERPILLAR INC.,) 04-11836-RCL
Defendant.)

MOTION HEARING
BEFORE THE HONORABLE JOYCE LONDON ALEXANDER
UNITED STATES MAGISTRATE JUDGE

May 31, 2006

Boston, Massachusetts

For the Plaintiff:

NANCY M. REIMER, ESQ.
CHRISTIAN G. SAMITO, ESQ.
Donovan Hatem, LLP
Two Seaport Lane
8th Floor
Boston, MA 02210
617-406-4500

For the Defendant:

JOHN A.K. GRUNERT, ESQ.
CHRIS PARKERSON, ESQ.
Campbell, Campbell, Edwards & Conroy, PC
One Constitution Plaza
Boston, MA 02129
617-241-3000

Proceedings recorded by electronic sound recording,
transcript produced by Apex Reporting.

APEX Reporting
(617) 426-3077

P R O C E E D I N G S

THE CLERK: All rise. United States District Court for the District of Massachusetts is now in session, the Honorable Joyce London Alexander presiding. You may be seated. Today is May 31st, 2006 in the matter of Trans-Spec Truck Services, Inc., versus Caterpillar, Inc., Civil Action 04-11836. Will counsel please identify themselves for the record?

MS. REIMER: Good afternoon, your Honor. My name is Nancy Reimer and with me is Christian Samito. We represent the plaintiff, Trans-Spec.

THE COURT: Good afternoon.

MR SAMITO: Good afternoon, your Honor.

MR. GRUNERT: My name is John Grunert, representing Caterpillar. With me is my associate, Chris Parkerson.

THE COURT: Good afternoon.

MR. PARKERSON: Good afternoon.

THE COURT: I have the motion to compel production of documents and extend expert discovery and the motion for sanctions. I also have the motion to amend and motion for summary judgement, is that correct?

MS. REIMER: Yes, your Honor.

THE COURT: Let me hear you on the motion to

1 amend.

2 MR. SAMITO: Your Honor, in short, this is a case
3 where Caterpillar is saying, we made a promise but we didn't
4 promise to keep it. Your Honor dismissed two counts of a
5 three count complaint. Trans-Spec moved to amend based on
6 information that was obtained in the course of discovery.
7 Much of it after the argument to amend -- on the motion to
8 dismiss. Character raised here is the issue that Rule 16
9 governs on this motion to amend. In fact, this motion to
10 amend would be valid even under a Rule 16(e) manifest
11 injustice standard. That's not what we have here.

12 It is in the Court's discretion, regardless of a
13 schedule (unintelligible), to grant a motion to amend. More
14 importantly, however, there's a large body of case law in
15 the Supreme Court and the First Circuit that addresses what
16 happens when a motion to dismiss is granted. And uniformly
17 what that case law states is that leave should be granted.

18 If you look at Fullman v. Davis, a case that
19 doesn't into Rule 15 or Rule 16, and which applies, it says
20 after dismissal we revert back to the Rule 15 standard.
21 Under the Gaffney case, 1973 in the First Circuit, the First
22 Circuit doesn't get into Rule 15 or 16. It says, there was a
23 dismissal. There was a way to cure the defects that were
24 found in the dismissal, and leave should be granted. And
25 there's a body of case law that's in the papers in the

1 motion to amend that gets into this issue. That repeats
2 time and again, if you can cure deficiency or what is
3 thought to be deficiency and the case can go forward based
4 on based on the new complaint that leave should be granted.
5 It's almost automatic, based on the case law that's cited in
6 our brief. The other argument that Caterpillar makes deals
7 with the merits. This is a case where Trans-Spec purchased
8 22 truck engines from Caterpillar.

9 THE COURT: But you were allowed a motion to amend
10 a year ago, is that not correct?

11 MR. SAMITO: We were allowed to amend the
12 negligence count.

13 THE COURT: And you're asserting that information
14 was not known since before you were allowed to amend in
15 2005?

16 MR. SAMITO: Well your Honor, we've had a number
17 of discovery issues, and frankly it's been very difficult
18 getting a lot of documents from Caterpillar. We did not
19 take the Rule 30(b)(6) deposition due to those document
20 discovery issues, and if you look at the record there's a
21 number of motions to compel and we have a number of
22 discovery issues --

23 THE COURT: What, in particular, did you not know.
24 What, in particular, did you not know, that's just come into
25 your possession?

1 MR. SAMITO: Well one of the big issues here is
2 according to the warranties that are in play, Caterpillar
3 warranted the engines and the flywheel housings in
4 particular.

5 THE COURT: I know about that. I've had this case
6 forever.

7 MR. SAMITO: What the issue is, is that the
8 warranties say it's for defects in workmanship and
9 materials, and it turns out Caterpillar never checked to
10 find out if it was a defect in workmanship or materials. In
11 fact, they started honoring the warranty and admitted that
12 it was a defect in workmanship and materials. Then in 2003,
13 some gentleman in the Caterpillar Connecticut office,
14 without consulting any engineers, without consulting anyone
15 decided, we're going to stop making payments on this five
16 year warranty. And that was discovered in the September
17 21st, 2005, after the motion to dismiss hearing.

18 There was a two year warranty document that we
19 didn't have until around the time of the motion to dismiss
20 hearing that bears on this. That two year warranty document
21 explicitly shows that Caterpillar treats the five
22 year/500,000 mile warranty as more than a repair or replace
23 warranty, as your Honor found on the motion to dismiss. It
24 explicitly states -- under the two year warranty that we got
25 after the hearing, it shows that Caterpillar treats the 5

1 year/500,000 mile warranty as a straight warranty, not a
2 repair or replace and that bears directly on your Honor's
3 ruling in that motion to dismiss. We didn't have that at
4 the time of the hearing. These are two key facts why we're
5 in here, among many others.

6 THE COURT: Let me hear from the opposition.

7 MR. GRUNERT: The statement that Trans-Spec did
8 not have the warranty is false.

9 They were given a copy of that warranty. The
10 attorneys were given a copy of that warranty in
11 Caterpillar's automatic disclosure. I had no reason to
12 think that that representation would be made to you or else
13 I would've brought the documents to show that. However,
14 beyond that, Mr. Howard, himself, testified that he received
15 those warranties with the trucks, so that Mr. Howard had
16 those warranties before this case was commenced.

17 Now the question you asked, of course, is the
18 pertinent one. What specific information with reasonable
19 diligence, could Trans-Spec not have had before the deadline
20 for moving to amend complaint of their complaint, and they
21 have not identified anything other than a document, which in
22 fact they did have. The legal standard in the First
23 Circuit, and I have cited the O'Connell v. Hyatt Hotels case
24 to you that there are many cases at the appellate level.
25 The legal standard, regardless of what it was in 1973, since

1 the amendments to Rule 16 are that a scheduling order
2 deadline may not be amended unless there is a showing of
3 good cause, and good cause means that with reasonable
4 diligence the deadline could not have been met. There is no
5 reason the deadline could not have been met. I went
6 through, at some length, in my opposition, all of the facts
7 that they now want to allege that obviously were known to
8 Mr. Howard and to his attorneys many years ago.

9 Judge Lindsay could not have been clearer in his
10 order in October, 2005 that there are going to be no more
11 amendments to this scheduling order. And I suggest to you
12 that this motion is meritless on its face and it should be
13 summarily denied. It is, in essence, just a attempt to get
14 your Honor and Judge Lindsay to reconsider the dismissal of
15 the warranty claims, which was an absolutely proper
16 dismissal.

17 Thank you, your Honor.

18 THE COURT: Let me hear Trans-Spec's emergency
19 motion to compel.

20 MS. REIMER: Your Honor, this deals with the
21 30(b)(6) deposition and information that we didn't have. We
22 noticed, in accordance with the time schedule, we noticed
23 Trans-Spec's 30(b)(6) deposition.

24 In the notice, I intentionally set it up so that
25 approximately a week before the deposition, Trans-Spec would

1 produce to us those documents upon which its experts, and I
2 use that word very loosely because Trans-Spec identified a
3 number of experts who --

4 THE COURT: Let me just narrow this for you
5 because this motion goes back and forth. It's one of the
6 more fascinating motions I've ever read in my life, motions
7 and oppositions. And I'll tell you the one reason, because
8 I've never had a motion where someone has asked for
9 information about hotels and air travel to prove a point.

10 It seems as though a deposition was, and I don't
11 even know if I'm using the correct words, but tentatively
12 scheduled and there was some -- well the tentativeness seems
13 to be because of the discussion between Caterpillar and
14 Trans-Spec. Are we having a deposition? You need to have
15 the documents in which to conduct the deposition. Who will
16 come, is this being canceled, we won't come if you're not
17 going to have the documents to us.

18 MS. REIMER: It certainly was straightforward than
19 that even, your Honor. Under the notice, the notice called
20 for the documents to be produced before the deposition. The
21 reason, and the very specific reason, is because these
22 depositions in the 30(b)(6) dealt with --

23 THE COURT: I don't need the reason. That's not
24 pertinent to what --

25 MS. REIMER: Well --

1 THE COURT: It's not pertinent to the Court's
2 inquiry. The Court must make the decision.

3 So, the reason you want the documents right now is
4 not to me a major issue. The issue is, you scheduled the
5 deposition, then what happened on the other side?

6 MS. REIMER: In a telephone conversation on
7 February 8th, two days before which the documents were to be
8 produced, on a completely unrelated subject matter, I asked
9 Mr. Grunert if he was going to -- when he was going to be
10 producing the documents. He made it quite clear to me that
11 he was not going to produce the documents and they would be
12 available at the deposition. I responded to Mr. Grunert and
13 said, there was a reason why we wanted the documents
14 beforehand. It's because they dealt with technical
15 engineering issues. I'm not an engineer, your Honor, I'm an
16 attorney.

17 THE COURT: No, that's fine. I understand that.

18 MS. REIMER: So then I sent -- Mr. Grunert refused
19 to produce the documents. I wrote him a letter confirming
20 the conversation and I said, if you refuse to produce the
21 documents before the deposition, we would not go forward.
22 The very next day I filed this emergency motion to compel,
23 asking the Court to require Caterpillar to produce the
24 documents before the deposition and then to extend the date
25 because we were running up against the discovery deadline

1 for the expert depositions. To extend the date so that we
2 could have the documents, have our expert engineer review
3 them before the deposition and then take the deposition in
4 an orderly fashion and without, frankly, wasting the
5 witness' time at the deposition trying to go through the
6 documents and our time in the interest of economy and
7 efficiency to make this deposition go smoothly, given the
8 fact --

9 THE COURT: One second. But they told you -- you
10 filed the motion. Before you filed that motion Caterpillar
11 said to you, we're not going to go, is that correct?

12 MS. REIMER: They said they were not --

13 THE COURT: They pulled out?

14 MS. REIMER: That's right.

15 THE COURT: That's what they said?

16 MS. REIMER: That's right.

17 THE COURT: So then why did you not say, "Okay.

18 The deposition is off." That's what you said on the phone.

19 MS. REIMER: We did and I said it in my letter and
20 I said it in email correspondence. Frankly, I do not
21 understand Caterpillar's misunderstanding. What they're
22 trying to do here is trying to misdirect the Court for their
23 own abuse of discovery and trying to table our loss and say,
24 because I didn't get on a plane during the day of a
25 blizzard, in which Logan Airport was closed --

1 THE COURT: Now let me ask Caterpillar.
2 Caterpillar, what makes you think, after counsel had told
3 you, "We're not going forward.", that you shouldn't believe
4 them?

5 MR. GRUNERT: That's not what they told me, your
6 Honor, and if I may just refer you to the documentation.
7 And the first part of the documentation I'd like to refer
8 you to is Ms. Reimer's affidavit supplied in opposition to
9 my motion.

10 Paragraph 6, she recounts the conversation on
11 February 8th. She says, "I also informed Attorney Grunert,
12 during this February 8th, 2006 telephone conference, that
13 Trans-Spec would not go forward with the depositions unless
14 it received the documents beforehand or the Court denies an
15 emergency motion.

16 THE COURT: And the Court didn't.

17 MR. GRUNERT: That's right.

18 THE COURT: Right. But counsel, to me this is all
19 a matter of semantics, we're all grown. This is a matter of
20 semantics -- I'm not going forward with the deposition
21 unless I get the documents, I'm not showing.

22 MR. GRUNERT: Your Honor --

23 THE COURT: So the motion for sanction is denied.
24 You can appeal it if you wish.

25 MR. GRUNERT: Your Honor, may I be heard further?

1 THE COURT: You may be heard for about two minutes
2 because the Court has decided. And I've looked at all of
3 these matters and I just -- I don't even see your point.

4 MR. GRUNERT: What I was told was that the
5 depositions would not go forward unless the Court denied an
6 emergency motion.

7 THE COURT: No, she didn't say that on the phone.

8 MR. GRUNERT: She said that on the phone and I
9 recounted that in my affidavit. She said it in her own
10 affidavit and they said it in their opposing papers
11 themselves.

12 THE COURT: Unless they got the documents or the
13 Court denied the emergency motion, but she wasn't given the
14 documents and you knew it. So you knew --

15 MR. GRUNERT: I did not know, however, that the
16 Court was not going to deny their motion. In fact, my
17 expectation was that that motion was going to be promptly
18 filed and that steps would be taken to have it heard and
19 decided. And if you look at the opposition we filed,
20 Mr. Parkerson specifically said he was available for a
21 hearing on that motion by telephone.

22 I did not have the luxury of waiting to find out
23 whether that motion was going to be denied and the
24 depositions were going to go forward as scheduled. I asked,
25 from the airport, I asked Trans-Spec's lawyers repeatedly,

1 just tell me that regardless of what happens with your
2 emergency motions, these depositions are not going forward
3 as scheduled and even though my bags are already on the
4 plane, I'll come home, I won't go to Peoria. They would not
5 tell me that. And the last e-mail that they sent, and you
6 have it, it's an Exhibit filed to my motion, Mr. Samito
7 said, "No, we're not canceling the depositions regardless of
8 what the Court does on the motion." So this was a
9 conditional statement that, depending on what happened with
10 that motion, either they were going forward or they were
11 not. And if they had decided to go forward and I hadn't
12 shown up, then they'd be looking for sanctions.

13 THE COURT: But it would seem to the Court that if
14 there is a motion before the Court and step one, counsel
15 says, "My client will not go forward with the deposition
16 unless the documents are produced prior." Two, emergency
17 motion filed with this Court, this Court does not act. One
18 would presume, given the prior statement, that that
19 deposition is not going forward.

20 MR. GRUNERT: Your Honor --

21 THE COURT: Counsel would have called the Court
22 and the Court would've said it's on the calendar, it may be
23 rescheduled, but the hearing will take place. Obviously,
24 there's an issue here and so --

25 MR. GRUNERT: Your Honor, the problem is that I

1 looked for exactly the unequivocal statement that you have
2 just suggested and I received in response a statement saying
3 that whether we were going forward or not depended on what
4 the Court did with this emergency motion. I had to go to
5 Peoria. I had to get a flight there to prepare the witness
6 and to have the witness' documents available. I couldn't
7 wait. These depositions were not tentatively scheduled,
8 they had been noticed for specific dates that were agreed
9 upon. And all I wanted was an unequivocal statement, one
10 way or the other, are we going forward and they would not
11 give it to me.

12 THE COURT: It seems to the Court that the two
13 parties that counsel have or for counsel have more additions
14 than the parties themselves.

15 What's the next issue, the motion for a summary
16 judgement. You may be heard.

17 MR. GRUNERT: Your Honor, there was only one claim
18 remaining and that's the negligence claim. And there are
19 two separate grounds why that claim fails as a matter of
20 law.

21 One ground disposes of the entire claim.

22 The second ground would leave a small amount of
23 that claim pending, so the second ground is in the nature of
24 a motion for partial summary judgement. The document -- and
25 by the way, when I think of it, attached to my motion for

1 summary judgement are the warranties that Caterpillar gave.
2 These are the warranties, and I attached the testimony from
3 Mr. Howard saying that he received them. Those are the very
4 warranties you were told on the motion to amend that the
5 plaintiff didn't have until recently, by the way.

6 So the warranty that was given contains in bold
7 faced print, capitalized letters, an exclusion that says
8 that Caterpillar is not liable for any negligence in
9 connection with these engines. That exclusion, under
10 General Laws Chapter 220110, is conspicuous as a matter of
11 law and is enforceable. And Massachusetts law could not be
12 clearer that exclusions of negligence liability, at least
13 between businessmen, are not only enforceable but they're
14 favored. The Sharon case, Sharon v. City of Newton says
15 they're favored because the law encourages the consensual
16 allocation of risk between business people.

17 There's no dispute that that document is the
18 warranty. There's no dispute that it was received. The
19 legal effect of that language is clear. Under the Sharon v.
20 Newton case, once that exclusion has been presented to you,
21 the burden is on the plaintiff to come forward with specific
22 evidence to show you that there is some reason why that
23 release should not be given effect. I have gone through, at
24 considerable length in my required brief, the various
25 grounds that Trans-Spec has advanced. But I think I need to

1 say --

2 THE COURT: How do you respond to Trans-Spec's
3 asseveration that a product has an apparent defect the buyer
4 receives less than what the contract calls for.

5 MR. GRUNERT: The --

6 THE COURT: And therefore, the remedy fails of its
7 specific purpose, of its essential purpose?

8 MR. GRUNERT: The section of the uniform
9 commercial code, I think it's 20219. I could be wrong, it
10 might be 2207, but the section of the uniform commercial
11 code that pertains to failure of the essential purpose says
12 that if a particular provision in a contract, if a
13 limitation of remedies provision fails of its essential
14 purpose, then other UCC remedies are available. Negligence
15 is not a UCC remedy. There are no UCC remedies in this case
16 because that claim is barred by the statute of limitations.
17 So the failure of essential purpose, and I cited the case
18 authority to you your Honor, the Canal Electric v.
19 Westinghouse case is SJC decision that's right on point.
20 There's also a decision out of the Ninth Circuit, Tokyo
21 Marine v. McDonnell Douglas, I believe, it's again cited in
22 my brief, where there's exactly this issue. There was a
23 negligence claim and the defense was there's an exclusion
24 about negligence claims and the plaintiff said, well the
25 contract failed of its essential purpose. And that, like

1 this one, was a case where the warranty claims were barred
2 by the statute of limitations. The Ninth Circuit says, no,
3 no, no, no. Failure of essential purposes means you have
4 UCC remedies. Your UCC remedies failed under the statute of
5 limitations. You've got no -- that failure of essential
6 purpose has no effect on an exclusion of negligence.

7 THE COURT: What about the economic loss doctrine
8 being an all or nothing doctrine?

9 MR. GRUNERT: Again, that's just not the law. And
10 I think on that subject, the most illustrative case is
11 probably the Icelandic Coast Guard v. United Technologies
12 case that I cited to you. Although, there's another case
13 that I didn't cite to you, but I'd like to give you the cite
14 now, it's Northern States Power Company v. International
15 Telephone and Telegraph. It's at 550 F.Supp. 108 out of the
16 District of Minnesota, which is also illustrative.

17 What these cases show and really, the Icelandic
18 Coast Guard case is very good, because what happened in that
19 case is the defendant had sold a helicopter to the Coast
20 Guard. The helicopter crashed as a result of a product
21 defect. And as a result of the crash, the crew members were
22 killed, and the Coast Guard had to expend a lot of money on
23 finding and retrieving their bodies. The Coast Guard also
24 had to expend a lot of money finding the wreckage of the
25 helicopter, with lost use of the helicopter, had to replace

1 the helicopter. And so, the Coast Guard sued United
2 Technologies and United Technologies said, well your claim
3 is barred by the economic loss doctrine.

4 And what the District Court in Connecticut said
5 is, well you've got various kinds of losses here. To the
6 extent that this crash caused injury to the crew members,
7 that's an injury to persons or other property. And so, you,
8 the Coast Guard can recover what you expended in finding and
9 retrieving the crew members bodies.

10 As to the other categories of damages, the expense
11 of finding the wreckage of the helicopter, the lost time,
12 lost use of the helicopter, the cost of replacing the
13 helicopter, those are all economic losses caused just by a
14 defect in the product itself. Those you cannot recover.

15 So it says, summary judgement, as to the claims
16 for those elements. No summary judgement for the claims for
17 expenses searching for the crew members body. And if you
18 review the Jeldwin case, if you review the other cases that
19 I cited to you, you will see that that consistently is how
20 the economic loss doctrine is applied.

21 The economic loss doctrine permits recovery of
22 damages proximately caused by damage to other property.
23 That is to say, property other than the product itself, or
24 to person. It bars elements of damage that are attributable
25 just to the defect in the product itself, to the loss of use

1 of the product through reduction in value. It's not an all
2 or nothing matter in that case that Trans-Spec cites for
3 that proposition doesn't stand for it. I talked to you
4 about that in the brief. I don't think I need to recount it
5 here, but that that statement was just a vague passing
6 reference and a general history and it was followed by a
7 number of citations to other authority, and if you read the
8 other authority, you see that it says exactly what I just
9 explained to you.

10 The economic loss doctrine requires
11 differentiation between different types of damages. And the
12 reason it does that is that if there are tort type damages
13 that have been caused, the courts don't want to deny
14 recovery but the problem of tort law swallowing up contract
15 law remains. And so, the courts are very tough in saying
16 that you cannot recover economic losses, economic type
17 damages unless they are caused by damage to other property,
18 not to the product itself.

19 THE COURT: Thank you.

20 MR. GRUNERT: Thank you, your Honor.

21 THE COURT: Trans-Spec, talk to the Court about
22 the warning disclaimer not being enforceable because of its
23 failure of its essential purpose.

24 MR. SAMITO: Well your Honor, I think Andover Air
25 case is very instructive, in that Judge Zobel -- the

1 plaintiff, Andover -- if Andover proves that the warranty
2 failed in its essential purpose, the exclusion of other
3 damages becomes inoperative and Andover may seek
4 consequential and incidental damages as allowed by the code.

5 THE COURT: But Caterpillar has said that
6 negligence is not a UCC remedy and therefore, you can't even
7 invoke that.

8 MR. SAMITO: But where the warranty fails of its
9 essential purpose, your Honor, all bets are off. You can't
10 just claim negligence, have everything else fall to the
11 wayside and allow the breaching party to hold onto that
12 disclaimer that benefits it. They're not getting the
13 benefit. There's a difference, and there's other cases. I
14 mean, the Hadar case from the Southern District of New York
15 bears on this. In other cases that are cited --

16 THE COURT: But Caterpillar says that it doesn't
17 fail -- in Court, the Court -- if the Court is wrong, did
18 you not say that Caterpillar -- did Caterpillar not say that
19 it doesn't fail of its essential purpose, is the Court
20 correct?

21 MR. GRUNERT: I don't concede that --

22 THE COURT: Negligence is not a UCC remedy.
23 That's what Trans-Spec is invoking when it says that it
24 fails of its essential purpose?

25 MR. GRUNERT: I don't believe --

1 THE COURT: That the remedy fails?

2 MR. GRUNERT: I don't believe that --

3 THE COURT: Okay.

4 MR. GRUNERT: For purposes of --

5 THE COURT: Let me ask you and then have you
6 respond. Let me ask Caterpillar the following question:
7 Trans-Spec says that the disclaimer is unenforceable because
8 it fails of its essential purpose. What do you say to that?

9 MR. GRUNERT: I say number one, that the -- what
10 Trans-Spec claims failed of its essential purpose is the
11 warranty that Caterpillar --

12 THE COURT: So you're saying they're saying the
13 warranty failed of its specific purpose?

14 MR. GRUNERT: That's right.

15 THE COURT: That has nothing to do with this
16 negligence claim.

17 MR. GRUNERT: That's correct. And if there had
18 been a timely action brought to breach of warranty and if
19 Trans-Spec --

20 THE COURT: We're dealing with the negligence.

21 MR. GRUNERT: Right, right.

22 THE COURT: Stop saying anything about the
23 warranty. They're saying this disclaimer is unenforceable
24 because it fails of its essential purpose. You say what
25 again, and don't bring in the warranty?

1 MR. GRUNERT: The essential purpose of the
2 disclaimer is obviously to disclaim liability for
3 negligence. The argument that the warranty failed of its
4 essential purpose as a matter of law means only that if that
5 were found to be true, they would have other UCC remedies
6 available to them. In other words, the limitation to a
7 repair or replacement of defective parts would fall out of
8 the case and Trans-Spec could sue for contract damages. The
9 warranty claim -- all contract damages are barred by the
10 statute of limitations.

11 THE COURT: But this is negligence.

12 MR. GRUNERT: That's right. Negligence is not a
13 UCC remedy. So the failure of essential purpose law is
14 simply irrelevant to this motion. And I cited --

15 THE COURT: That's what I wanted to hear you say.
16 Thank you.

17 MR. SAMITO: Well your Honor, with all due respect
18 here, Caterpillar, the cases that they cite involve
19 situations including the Canal case, where the defendant
20 tried to perform under the contract. Here, Caterpillar
21 breached the contract, breached the warranty in 2001,
22 breached it again in 2003 all together, and that's the
23 difference.

24 It's one thing for the Court to look at a
25 situation where Caterpillar was performing under the

1 warranty and then it may be a different story in terms of
2 the exclusion of negligence, but that's not what happened
3 here. And the cases that Caterpillar cites don't apply for
4 that reason.

5 This is a situation where Caterpillar left
6 Trans-Spec holding an open bag. Said we're not going to
7 honor any other provision in these two warranty documents
8 except for the disclaimer of negligence. That, we're going
9 to cite that. We'll honor that because it benefits us. And
10 that's the situation.

11 Time and again, the cases cited from Boston
12 Helicopter to Hadar, the rejection of negligence
13 disclaimers, Somerset Savings, Omni Flying, Andover, again
14 and again said, that you can't have disclaimer of negligence
15 where it's unconscionable or where it failed of its
16 essential purpose. It's integrated into a document that
17 completely fails. The Court will enforce that one
18 provision. And again, the Andover Air case provides
19 excellent guidance on that point. Judge Zobel talks about
20 that unconscionability of the limited remedy and where it
21 fails of its essential purpose.

22 THE COURT: So that Caterpillar's whole issue
23 about the code is really irrelevant?

24 MR. SAMITO: Yes, your Honor.

25 THE COURT: Okay. Let me hear you on the economic

1 loss.

2 MR. SAMITO: Again, your Honor, the cases that
3 Caterpillar cites involve situations where the loss is
4 purely economic. If you look at the Binding Berish case, I
5 remember from the last hearing that your Honor knows the
6 Berish case quite well, referred to it as well as other
7 cases that are cited here. The Massachusetts Supreme
8 Judicial Court, not Connecticut, we'll dealing with
9 Massachusetts law, Berish is binding. The SJC in Berish
10 said, where you have damage, both to the actual property but
11 then to elements outside of the property, the economic loss
12 doctrine doesn't apply. The Damon court, in 1998, does cite
13 three prior Wisconsin cases and then it comes down with its
14 statement, the economic loss doctrine does not bar
15 commercial purchasers claims based on personal injury or
16 damage to property other than the product, or economic loss
17 claims that are alleged in combination with non-economic
18 losses.

19 Now what Caterpillar does here, is it files a
20 motion for summary judgement, complains throughout that
21 Trans-Spec doesn't provide adequate proof of the damages.
22 Doesn't complete its Rule 30(b)(6) deposition of Trans-Spec,
23 and then it says, well there's not enough proof in the
24 record and the proof that is there is not credible. And
25 issues of credibility aren't for the Court to decide at the

1 summary of judgement stage, they're for the jury to decide.

2 And the issues in terms of whether the damage was
3 economic or not economic going forward, by Caterpillar's own
4 notion, they concede that the damage to the truck's
5 clutches, the drive trains, the transmissions, damage to
6 property of Trans-Spec in terms of the actual physical
7 ground, the oil leaks on other peoples, other customer's
8 property. That's all issues that show the economic loss
9 doctrine doesn't apply here. It's by the Binding Berish
10 case. There was damage to property outside of the engines
11 themselves. And if the damage was just confined to the
12 engines, that may be one story, but that isn't what was the
13 case here in the deposition testimony. We have affidavits
14 that point to the fact that there was damage to other
15 property.

16 The fact that Caterpillar doesn't like that
17 evidence and doesn't like the affidavits is not neither here
18 nor there. I note that Caterpillar moves to strike four out
19 of five documents. Four of the documents are documents that
20 they actually append to their own motion for summary
21 judgement. And now they're saying, oh we should exclude
22 that. They want to exclude any evidence that there was
23 damage to other property.

24 There's also issues with misrepresentations.
25 Negligent breach of contract, those are two issues of

1 negligence that are encompassed in the negligence count that
2 are carved out of the economic loss doctrine, and I need not
3 spend the time of the Court, indeed the cases are cited in
4 our opposition papers. But negligent misrepresentation, and
5 we (unintelligible) the history with documents, with
6 Caterpillar testimony, with affidavits, and the negligent
7 breach of the warranty documents -- the negligent breach of
8 contract --

9 THE COURT: One of the arguments you make is that
10 the Court twice rejected Caterpillar's contention, but the
11 Court did not because it said at that stage of the
12 proceedings it was not prepared to render a decision on that
13 issue. But the Court didn't reject Caterpillar's assertions
14 outright. And so now Caterpillar brings them and you're
15 saying, based on the cases that have been previously cited,
16 that the Court should now reject Caterpillar's assertions
17 outright?

18 MR. SAMITO: I don't remember if I cited all the
19 cases, but the Berish v. Bernstein in 2002, the Aldridge v.
20 ADD, which is SJC 2002, several other cases that are given
21 are in Caterpillar's own memorandum on page 6 are all
22 reasons why the Court should deny as to the economic loss
23 argument because there was damage to property outside of the
24 engines themselves. And as a result of that, the negligence
25 claim on that ground goes forward.

1 THE COURT: Counsel, what about the injury or
2 damage to other than the design or manufacture.

3 MR. GRUNERT: I told you when I started that, as
4 far as the economic loss doctrine is concerned, it's a
5 motion for partial summary judgement.

6 I have seen records indicating that, at least,
7 sometimes when a flywheel housing failed there would be
8 damage to a clutch or a starter motor, and those would have
9 had to have been replaced. The cost of replacing those
10 sorts of incidental parts is a tiny fraction of the damages
11 sought in this case. But I was explicit that that extent,
12 to the extent that recovery is sought for damage, the cost
13 of replacing damaged truck parts, that I don't seek summary
14 judgement under the economic loss doctrine, although I do
15 under the contractual exclusion.

16 Beyond that, I just have two comments. Number
17 one, you will not find anything in my brief that talks about
18 credibility. I'll be perfectly content if your Honor simply
19 looks at the evidence attached both to my motion and to the
20 opposition, and if you'll see what the evidence shows as
21 distinct from what the attorneys say in their brief.

22 And the second thing is that the Berish case has
23 nothing to do with this issue. The Berish case does not
24 address the subject of whether when there are both economic
25 losses and non-economic losses, whether the plaintiff is

1 limited to recovering only losses that are proximately
2 caused by damage to other property, and that is the issue
3 that's addressed here and that is the issue that is
4 addressed in all of the cases that I've cited you on the
5 economic loss doctrine, your Honor.

6 THE COURT: Well the Berish case says that the
7 economic loss doctrine precludes recovery for negligence in
8 the design or manufacturer of the product if the negligence
9 causes no injury other than to the product itself. That's
10 what it says.

11 MR. GRUNERT: Correct.

12 THE COURT: And so that if portions of the
13 decision sort of argues in favor of Trans-Spec, do you
14 disagree with that?

15 MR. GRUNERT: Well yes. I mean, as you know --

16 THE COURT: I should've known that.

17 MR. GRUNERT: As you know, courts decide the
18 issues that are presented to them. Nothing in the Berish
19 case indicates that the Court was asked to decide whether,
20 in the presence both of damage to both other property and
21 what would typically be just economic loss, damage to the
22 product itself, they weren't asked to decide whether you can
23 collect for the damage caused to other property but not for
24 the product itself. That issue wasn't before them, it is
25 not addressed.

1 What that Court basically said is, well the
2 product in this instance is the whole house, it's not just
3 the windows. And you know, we accept that. That, I guess,
4 is the law of Massachusetts. But it didn't address the
5 issue that's before you now and why would they go out on a
6 limb to address that issue, but the issue has been
7 addressed, it was addressed in the Jeldwin case and it was
8 addressed in the other cases that I've cited to you. And I
9 suggest to you that those cases make perfect analytical
10 sense.

11 And Trans-Spec has not cited you to any authority
12 to the contrary if you actually read the cases that they've
13 cited you. So that's really all I have to say about the
14 Berish case. You've characterized that when we were before
15 you once before as a, I'm not sure of the words you used,
16 but it indicated that it is sort of a difficult case to
17 understand how they got to where they were going.

18 THE COURT: But they got there.

19 MR. GRUNERT: They got there. They got to say
20 what the law is, but the issue that is before you is not one
21 that they addressed or decided. Thank you, your Honor.

22 THE COURT: Now before you leave and I take all of
23 this under advisement to send to you, when is the deposition
24 going to take place and when are these documents going to be
25 produced? Is it sometime in June?

1 MS. REIMER: There is no date scheduled. I'm
2 reluctant to take the deposition without reviewing the
3 documents because --

4 THE COURT: Are the documents ready?

5 MR. GRUNERT: Well your Honor, I object to having
6 the depositions taken or having any --

7 THE COURT: Right. So they'll be taken. Will
8 they be ready in June? Will the documents be ready in June?

9 MR. GRUNERT: I --

10 THE COURT: I've just said we're going to take
11 these depositions, we're going to produce these documents
12 and end this case. The next person you should see will be
13 Judge Lindsay, it should be going to trial. Of course, what
14 you should be doing, this case should've been settled a long
15 time ago. But notwithstanding that fact, let's get a date
16 within the next two weeks. Can we agree on a date?

17 MS. REIMER: Your Honor, I actually have a trial
18 scheduled in Suffolk for June 12th. I presume it's going
19 forward with Suffolk --

20 THE COURT: That's June 12th, we're talking --

21 MS. REIMER: That's in two weeks.

22 THE COURT: We're talking about -- that's two days
23 before the Court is talking about. I'm talking about
24 between now and June 12th, can the documents be produced and
25 can the deposition -- and can we agree on a date?

1 Listen, I really think counsel are nice, but I
2 don't want to see you again. So I really would like to get
3 this done today. I'd like to find out when you're going to
4 produce the documents and when this deposition is taking
5 place.

6 MR. GRUNERT: Your Honor, there is no way that I
7 could appear for depositions, and I don't even know what the
8 schedule of the witnesses are.

9 THE COURT: Well no, you're going to tell the
10 witnesses because otherwise they're going to be in big
11 trouble.

12 So you're going to tell the witnesses that the
13 Judge has ordered that these depositions will take place on
14 or before. That's what you will tell them. So I would say
15 if it could be done between now and -- today is the 31st of
16 May. So if they could be done between now and the 9th, that
17 would probably be good because I think the last week in June
18 your clients will tell you they're going on vacation because
19 we're going into July 4th. I know that, it happens every
20 time. So it would be wise -- why don't we do this. I'm
21 going to leave the bench, you're going to call your clients
22 and you're going to give each other some dates to get this
23 done. Let's go off.

24 (A brief recess was taken)

25 THE COURT: Court is back in session. You may be

1 seated.

2 THE COURT: I'm informed that you were unable to
3 get -- Caterpillar, you weren't able to contact the experts?

4 MR. GRUNERT: Your Honor, the people that I
5 attempted to contact are the two Caterpillar coordinators
6 who have the contact information for these experts. I also
7 tried to contact one of the experts themselves. I was
8 unable to reach any of those people. That's the status of
9 where things stand.

10 THE COURT: Okay. Well, on or before June 30th.

11 MR. GRUNERT: Your Honor, I'll just point out that
12 in the papers that Trans-Spec filed, their opposition to my
13 motions for sanctions, they do state that if they get these
14 documents they do not need to take the deposition.

15 THE COURT: Is that correct?

16 MS. REIMER: What we stated is that we may not
17 need to take the depositions --

18 THE COURT: No, I need to know whether you're
19 going to take them or not. I mean, we're at the 11th hour
20 here.

21 MS. REIMER: If the documents answer our questions
22 with respect to the reports that were filed, we probably
23 will not take the depositions. If there are questions that
24 arise because of the documents that we would need to ask,
25 then we'd need to take the depositions.

1 THE COURT: Oh no, no, you have a one shot deal
2 here.

3 You two need to talk and make up your minds
4 whether you're going to take these depositions if you get
5 the documents. If you get the document, you will not need
6 to take the depositions or you're going to take the
7 depositions, or you're going to tell counsel -- if counsel
8 is asking his experts to take time out of what is a vacation
9 time, and he's asking them to take time, then you've got to
10 let them know.

11 MS. REIMER: I'm not disputing with you --

12 THE COURT: No, we're way past discovery. I need
13 to know the answer to that now. You two need to talk?

14 MS. REIMER: All right. Just one second.

15 MR. GRUNERT: Your Honor, could I direct your
16 attention to the last sentence of the opposition of the
17 plaintiff to Caterpillar, in its motion to sanction
18 immediately above the word "Conclusion" where they say
19 "Trans-Spec reiterates that if Caterpillar produces complete
20 copies of all the documents requested on Schedule A to the
21 notice of the deposition, Trans-Spec does not need to depose
22 Caterpillar's --

23 THE COURT: Well you should've given them those
24 documents before you came in here today and that would've
25 facilitated this matter.

1 MR. GRUNERT: I can tell you that I have given
2 them many of them already.

3 THE COURT: But you haven't given them all of
4 them, and that's a problem. If counsel -- I tell you, I
5 can't imagine, and I don't have this for trial so I can say
6 this. I can't imagine that the counsel in this case, and
7 this is on the record, haven't spent more money arguing
8 these motions than probably the damages in this case of the
9 clients. This is ridiculous.

10 Now do you wish to change this around a bit?

11 MS. REIMER: Your Honor, if we receive the
12 documents, we will not take the depositions.

13 THE COURT: When can you get them the documents?
14 That's the first question. You say you've given them most
15 of them, when can you give them all the documents?

16 MR. GRUNERT: Your Honor, that's what I tried to
17 find out. I can tell you -- let me tell you --

18 THE COURT: Well you were on the case, you're the
19 lawyer.

20 MR. GRUNERT: Your Honor, lawyers --

21 THE COURT: You said you prepared -- you were in
22 the process of preparing the witnesses for testimony based
23 on those documents, so they must be at hand.

24 MR. GRUNERT: Your Honor, a lot of these documents
25 were in electronic form. The witnesses were going to be

1 prepared to present them electronically at the deposition.

2 THE COURT: That ought to make it faster.

3 MR. GRUNERT: Well it would, but there is an issue
4 with one of them. The software is proprietary software and
5 so, there's been a lot of work going on trying to translate
6 those documents into a form that can be readable.

7 THE COURT: Okay. I'll issue an order today.

8 Do you think they can get it Friday? Do you think
9 they can get it by Monday?

10 MR. GRUNERT: I think, your Honor, that June 30th
11 was --

12 THE COURT: No, that's too long for the documents
13 because if you don't give them all the documents within two
14 weeks, then we have two weeks in which to notice
15 depositions.

16 MS. REIMER: Your Honor, there's one other --

17 THE COURT: So by June 14th it is hereby ordered
18 that all of the documents be produced. Then you may not
19 need depositions.

20 MR. GRUNERT: May I raise one other issue?

21 I did object, or the witnesses did object to these
22 notices to the extent, for example, that they seek
23 attorney/client privilege --

24 THE COURT: Give them a list. You know how to do
25 that. That is so basic.

1 MR. GRUNERT: So long as that's clear.

2 THE COURT: Give them the documents. Thank you.

3 Yes?

4 MS. REIMER: Your Honor, with respect to the
5 privilege issue. If these individuals are in fact experts
6 who are testifying experts, there should be no
7 attorney/client privilege issues, as we're entitled to all
8 the documents upon which these individuals relied on in
9 their opinion.

10 THE COURT: Exactly. And you'll battle that out
11 I'm sure at the deposition.

12 MS. REIMER: Right, or we'll be back in court
13 saying --

14 THE COURT: No, you won't be back in the Court
15 because if defense counsel comes back into this Court and
16 brings up an attorney/client privilege issue where there is
17 no basis in fact, he knows he will be held in contempt, so
18 that's not an issue.

19 MS. REIMER: Thank you, your Honor.

20 MR. GRUNERT: Your Honor, you said that this was
21 on the record. Is there a recording of this hearing?

22 THE COURT: There certainly is.

23 Now, by June 14th all documents.

24 Depositions to be completed on or before June
25 30th. So you should notice those documents as soon -- you

1 should read them, obviously, as soon as you get them and
2 then notice the depositions. And the Court will issue an
3 order in this case by the end of the day.

4 MS. REIMER: Thank you, your Honor.

5 THE COURT: Court is adjourned.

6 (Whereupon, the hearing was concluded.)

CERTIFICATE OF TRANSCRIBER

This is to certify that the attached proceedings
before: U.S. DISTRICT COURT, DISTRICT OF MASSACHUSETTS
in the Matter of:

TRANS-SPEC TRUCK SERVICE INC.,)
Plaintiff,)

-V-

CATERPILLAR INC.,)
Defendant.)

CIVIL DOCKET NO.
04-11836-RCL

Place: Boston, Massachusetts

Date: May 31, 2006

Were held as herein appears, and that this is the true,
accurate and complete transcript prepared from the
recordings taken of the above entitled proceeding.

J. Mocanu
Transcriber

06/05/06
Date